IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.3680 OF 1993.

WITH

CIVIL APPLICATION NO.1545 OF 2003

Shri Nainaram Premaji Choudhari
and ors. : Petitioners.

versus

Shri Pandurang Subrav Prabhu
and anr. : Respondents.

Mr.B.P.Apte for the petitioners.
Mr.K.U.Mandlik for Respondent No.2.
W.P. was dismissed as against Respondent No.1 as per Court's order dated 23/07/2002

CORAM : D.G.DESHPANDE, J.

DATED : November 6th, 2006.

ORAL ORDER [IN CHAMBER] :-

1. Heard learned advocates for the

petitioners and Respondent No.2. Petitioners are the landlords. There were two respondents. Pandurang Prabhu and Keshav Babanna Naik. The petition was dismissed as against Respondent No.1 by an order dated 23/7/2002.

2. A suit was filed by the petitioners at Pune against both these respondents for rent and possession of the premises. That suit was decreed in favour of the landlords. Respondent No.2 filed Appeal before the District Judge, Pune vide Civil Appeal No.594 of 1989. That appeal was allowed and the judgment and decree of the trial court was set aside, consequently, the suit of the landlords was dismissed and hence this petition.

3. I will be referring to the parties as the landlords and tenants. The landlords purchased the suit property on 21/3/1985 and consequently the original defendant No.1 - Respondent No.1 herein, became the monthly tenant of the hotel premises described in the plaint. In 1976 previous landlord had filed a suit being Suit No.1379 of 1976 against the original defendant No.1 - respondent No.1. In that suit the address

of the Respondent No.1, original defendant No.1 was given as 397 Mangalwar Peth, Pune 11. The respondent No.1/original defendant No.1 had appeared in that suit. It is on this address of respondent No.1/original defendant No.1 that the original landlord sent attornment letter dated 19/10/1985 to the defendant No.1 by R.P.A.D.. But it was returned back with endorsement of postman as "the respondent No.1 had left and new address not know". Thereafter the previous landlord published the attornment letter in daily newspaper Rashtratej on 2/12/1985 informing Respondent No.1 that he has become the tenant of the new purchaser and asking the Respondent No.1 to pay rent to the new purchaser/plaintiff. However, no rent was paid by respondent from 1.4.1985. Therefore, demand notice was sent by the landlord on 12.12.1985 to the respondent No.1 on the last known address. But it was returned back with the same endorsement that "defendant No.1 (respondent No.1) left the premises and new address is not known." Then this notice was published in daily newspaper "Rashtratej" on 16.12.1985 demanding the rent and other taxes due from 1.4.1985 within one month from the date of publication of the notice.

4. Admittedly, original defendant No.1 / respondent No.1 did not pay the rent within one month. Then he had sublet the premises to Respondent No.2 and has committed breach of lease. There were also allegations about the nuisance and then this suit came to be filed for ejection and possession.

5. In the suit, original defendant No.1 - respondent No.1 herein, was served. But he remained absent and, therefore, the suit proceeded exparte against him. Respondent No.2 appeared and filed his written statement denying the claim and contentions of the plaintiff/landlord. Main defence of respondent No.2 was that he was closely related to respondent No.1 who had no child. He was being treated by respondent No.1 as his son and member of his family. The original landlord had agreed to sell the suit property to this defendant by virtue of Sathekhat dated 13.7.1984. But then the original landlord caused delay in executing the sale deed. Respondent No.1 went to his native place and the present landlords in collusion with the previous landlord purchased

the property to the exclusion of the defendant.

6. Respondent No.2 also contended that he was accepted as tenant by previous landlord and the present landlords. He was ready and willingness to pay the rent. He had sent rent by three money orders but they were refused.

7. On these pleadings of the parties, the trial court framed following Issues :-

(1) Do Plaintiffs prove that the defendant No.1 is defaulter in payment of rent for more than six months ?

(2) Do plaintiffs prove that the defendant No.1 sublet assigned or transferred the interest in the suit premises in favour of defendant No.2 and thereby he is profiteering ?

(3) Do plaintiffs prove that the defendant No.1 is not using the suit premises and has kept it closed and locked withou any reasonable cause continuously for a period of more than six months

immediately prior to the date of filing of the suit ?

(4) Do plaintiffs prove that the conduct of the defendants amount to nuisance and annoyance to them and neighbouring occupiers ?

(5) Do plaintiffs prove that the defendant No.1 has committed breach of the terms and conditions of the lease agreement ?

(6) What is due to the plaintiffs ?

(7) Are plaintiffs entitled to possession ?

(8) What order and decree ?

The Findings on the aforesaid Issues given by the trial Court are as under :-

(1) In the affirmative

(2) In the affirmative

(3) In the affirmative

(4) In the negative

(5) In the affirmative

(6) Rs.972/-

(7) In the affirmative

(8) See the final order.

8. The trial Court considered the plea of the defendant No.2/respondent No.2 about so called agreement of sale and noted that though the respondent No.2 was banking upon Visar Pavati dated 18.5.1984 and Sathekhat, these documents were not forthcoming on record. So far as the contentions of Respondent No.2 that he was nearest relative of defendant No.1 and, defendant No.1 had transferred the tenancy right to him are concerned, the trial court found that the defendant No.2 also miserably failed to prove any of these things i.e. he being a nearest relative of defendant No.1 and defendant No.1 transferring tenancy right to him as no documents in that regard are forthcoming and defendant No.1 was

admittedly absent during trial and trial was proceeded exparte against defendant No.1.

9. The trial Court also found that if defendant No.2 was actually occupying the premises as a tenant, then it was incumbent upon him to reply the notice published by the previous landlord regarding attornment and the notice published by the present petitioners regarding demand for payment of rent etc. But the defendant No.2 neither accepted the notice sent by the petitioners nor gave any reply to any of the notices published in news papers. This attitude of defendant No.2 was not in conformity with the stand taken by him and, therefore, the findings on the Issues went against the defendants/respondents and, the decree came to be passed. However, the appellate Court set aside that decree and, therefore, this petition.

10. The learned advocate appearing for the petitioners contended that firstly, the landlords have proved that they have become the owners of the suit property pursuant to the sale deed executed by the previous landlord, secondly the previous landlord had sent notice of attornment

which could not be served on defendant No.1 as he had left his address, thirdly the notice was sent at the address given by defendant No.1 in the earlier proceedings, then previous landlord had published the notice of attornment as stated above in the news paper to which there is no reply from either of the defendants; that the petitioners had also published similar notice in the news paper demanding rent and that the contesting defendant No.2 utterly failed to prove that there is any agreement of sale between him and the previous landlord or that he was nearest relative of defendant No.1 or that defendant No.1 had transferred his tenancy right to defendant No.2. Therefore, according to him, in view of these proved facts, the appellate court was not at all justified in interfering with the order of trial court and in dismissing the suit by allowing the appeal filed by the tenant.

11. The learned advocate for respondent No.2 contended that there is no perversity in the order of the appellate Court and there is no need to interfere with the order of the appellate court.

13. The appellate Court has taken following points for determination :-

POINTS	FINDINGS
1. Whether the original plaintiffs/ respondent No.1 to 5 have proved that the original defendant No.1/ respondent No.6 is a defaulter in paying the rent for more than 6 months ?	No.
2. Whether the original plaintiffs/ respondent No.1 to 5 have proved that the original defendant No.1/ respondent No.6 had sublet the suit premises to the original defendant No.2 appellant?	No.
3. Whether the original plaintiffs/ respondent Nos. 1 to 5 have proved that the original defendant No.1/ respondent No.6 is not using the suit premises for more than 6 months without any just and reasonable cause preceding the	No.

	suit ?	
4.	Whether the original plaintiffs/ respondent Nos. 1 to 5 had proved that the original defendant No.1/ respondent No.6 had committed breaches of the terms and conditions of the lease agreement?	No.
5.	Whether the judgment and decree passed by the learned trial Court on 25.4.1989 in C.S.No.94/86 deserves interference at anyhand in this appeal ?	Yes.
6.	What order ?	As per final order

The appellate Court has noted that there was rent note vide Exhibit 49 which shows that the premises were let out for running a hotel and, there was a specific clause that original defendant No.1 shall not sublet the premises to any of the persons without consent of the landlord. Since defendant No.2 is claiming

through defendant No.1, a heavy burden lies upon defendant No.2 to prove that he was inducted as subtenant by original defendant No.1 with the consent of original landlord. But this aspect was not taken into consideration by the appellate Court and it came to wrong conclusion and gave perverse findings.

14. The appellate Court also came to the conclusion that since the defendant No.2 was in possession of the premises from 1973 and this fact was known to the plaintiffs/landlords, it must be presumed that the plaintiffs were knowing the status of defendant No.2 as tenant. Now, if the defendant No.2 claims to be subtenant of defendant No.1, then it is against the agreement between the parties. Subtenancy was against the rent note and there is no evidence that there was any agreement regarding subtenancy between the defendant No.1 and the present petitioners or defendant No.2 and the present petitioners, nor there is anything to show that the present petitioners accepted defendant No.2 as subtenant of defendant No.1. Mere possession does not conferring any contractual right to defendant No.2. The appellate Court has held that since

the defendant No.2 was in possession from 1972, the landlords should file a suit within 12 years. This is totally wrong. No such Issue was raised by any of the parties and, therefore, the findings of the Court, that suit for eviction on the ground of subletting is not within limitation, is perverse findings.

15. The appellate Court also went into the aspect of defence of defendant No.2 that the previous landlord had agreed to sell the property to him. If defendant No.2 had failed to produce any document in that regard, then that case was not required to be accepted at all. If the document i.e Sathekhat dated 13.7.1984 was there as between the previous landlord and defendant No.2, then as a man of ordinary prudence i.e. defendant No.2 was supposed to retain a copy of the Sathekhat and produce it in Court. When the terms of the agreement were reduced into writing, as alleged by the defendant No.2, then no oral evidence but the document itself has to be produced before the court.

16. These are two core Issues in this matter and, therefore, when the defendant No.2 has

failed on these two Issues, then appellate Court was totally wrong in setting aside the judgment of the trial Court.

17. So far as Civil Application is concerned, no submissions were made by the learned advocate for the respondent No.2, nor any reply is filed. Therefore, the Civil Application is allowed.

18. For all these reasons, I pass the following order :-

:ORDER:

The petition is allowed.

Rule is made absolute.

The judgment of the appellate Court is set aside and that of the trial Court is maintained with costs through out.

Civil Application is allowed.

[D.G.DESHPANDE, J.]